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THE CONSTITUTIONALITY OF THE PIPE-LINE AMENDMENT. — By an amendment to the Interstate Commerce Act adopted in 1906 all persons engaged in the transportation of oil by interstate pipe-lines are placed on the footing of common carriers.[1] A recent decision of the Commerce Court holding this amendment invalid because it applies to pipe-lines which have never professed to carry for the public,[2] presents a constitutional question of considerable importance. *Prairie Oil and Gas Co.* v. *United States*, U. S. Commerce Ct., March 11, 1913.

It may fairly be implied from the cases that one who transports his own property across a state line for business purposes is engaged in interstate commerce.[3] The first important question, then, which this decision raises is whether a statute which does not regulate the business of private carriage, but obliges all pipe-line carriers of oil to carry for the public, may fairly be regarded as a regulation of commerce. The statute in effect prohibits the business of private pipe-line carrier of oil. To what extent the power to regulate interstate commerce is the power to prohibit that commerce is not yet settled. It is doubtful how far the transportation of a useful article can be prohibited.[4] It is well

[1] 34 U. S. STAT. AT LARGE, 584, c. 3591, § 1.

[2] Pipe-lines which actually transport oil for the public are generally treated as common carriers. West Virginia Transportation Co. *v.* Volcanic Oil and Coal Co., 5 W. Va. 382. See Giffin *v.* Pipe Lines, 172 Pa. St. 580, 586, 33 Atl. 578, 580. See also WYMAN, PUBLIC SERVICE CORPORATIONS, § 59.

[3] United States *v.* Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527; Oklahoma *v.* Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. 564.

[4] See Lottery Case, 188 U. S. 321, 362, 23 Sup. Ct. 321, 329; United States *v.* Dela-

settled, however, that the total exclusion from commerce of undesirable persons or commodities in the interest of public health or morals is a regulation of commerce.[5] Since the purpose of the present act is directly to benefit commerce, it would seem even more clearly within the regulating power. Moreover, it does not exclude any commodity from commerce, but merely forbids transportation by private pipe-line. It is thus scarcely more than the prohibition of a method of doing business considered detrimental to commerce, which is certainly within the scope of the commerce clause.[6]

The statute therefore appears to be constitutional unless it is a violation of the Fifth Amendment. That amendment apparently limits the power of Congress to interfere with the liberty and property of the individual by commercial regulations in the same manner in which the power of the states is restrained by the Fourteenth Amendment.[7] Congress therefore cannot deprive the owner of a pipe-line of his right to the exclusive use of it except as an exercise of the police power.[8] In view of the recent decisions of the Supreme Court the earlier doctrine that this power extends only to legislation relating to health, morals, and safety must be regarded as obsolete.[9] It is now declared to include measures held by "strong and preponderant opinion to be greatly and immediately necessary for the public welfare."[10] It does not, however, enable the

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ware & Hudson Co., 213 U. S. 366, 406, 416, 29 Sup. Ct. 527, 535, 539. See also 21 HARV. L. REV. 595, 597.

[5] Lottery Case, *supra*; Hoke *v.* United States, 227 U. S. 308.

[6] Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 20 Sup. Ct. 96; United States *v.* Delaware & Hudson Co., *supra*.

[7] The right to engage in interstate commerce is not derived from the Constitution but existed prior to it. See Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 211; Hoxie *v.* N. Y., N. H. & H. R. Co., 82 Conn. 352, 364, 73 Atl. 754, 759. It is therefore protected by the Fifth Amendment, and the mere fact that the power of Congress to regulate it is express does not make any regulation of commerce due process of law, but simply transfers to Congress the power previously possessed by the states. See Carroll *v.* Greenwich Insurance Co., 199 U. S. 401, 410, 26 Sup. Ct. 66, 67. See 21 HARV. L. REV. 595 *et seq.*; 22 HARV. L. REV. 250, 251. It is well settled that the Fifth Amendment prevents Congress from using its power over interstate commerce to take private property for public use without just compensation. Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 13 Sup. Ct. 622; United States *v.* Lynah, 188 U. S. 445, 23 Sup. Ct. 349.

[8] At common law no one could be forced to assume the burdens of common carriage unless he professed to carry for the public. Allen *v.* Sackrider, 37 N. Y. 341. See Faucher *v.* Wilson, 68 N. H. 338, 339, 38 Atl. 1002, 1003. It would seem clear that to take away this right to use their property for their private business exclusively deprives the pipe-line owners of that property. See Weems Steamboat Co. *v.* People's Co., 214 U. S. 345, 355, 29 Sup. Ct. 661, 663.

[9] C., B. & Q. Ry. Co. *v.* Drainage Commissioners, 200 U. S. 561, 26 Sup. Ct. 341; Bacon *v.* Walker, 204 U. S. 311, 27 Sup. Ct. 289.

[10] See Noble State Bank *v.* Haskell, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188. This extension of the police power seems entirely logical. This power has been said to be "but another name for the power of government." Mutual Loan Co. *v.* Martell, 222 U. S. 225, 233, 32 Sup. Ct. 74, 75. Under our Constitution this power cannot be exercised in such a way as to deprive people of their property except to provide for some great public need. In an individualistic era it was generally believed that except in a limited class of cases governmental intermeddling was neither necessary nor desirable. But in recent years the popular conception of the function of government has been radically altered, and, consequently, we must alter also our notions of the scope of the police power, the power to provide what is needful for the social welfare.

state to take private property for public use without just compensation,[11] and thus the mere fact that the public desires to make use of pipe-lines is not a sufficient justification for compelling them to be devoted to common carriage. There must be something inherently opposed to public policy in their exclusive use by their owners to justify the prohibition of such a use.

It appears from the findings in the principal case that the expense of constructing pipe-lines and the enormous difference between the cost of transportation by them and that by any other agency give the existing pipe-lines a virtual monopoly of the transportation of oil, a situation of which they take advantage by insisting that all the oil which they transport be sold to them at the wells, thus controlling the market for crude oil as well as its transportation. At common law such a monopoly as this would be entirely legal since it does not involve any contracts in restraint of trade, but is merely the legitimate use of a position of economic advantage.[12] Nevertheless, the rapidly changing conditions of modern business have given rise to a strong popular conviction of the undesirableness of many business practices heretofore regarded as legitimate, and there would seem to be no reason why under the broad definition of the police power above laid down these convictions may not be embodied in constitutional legislation.[13] Although it cannot be said that all forms of monopoly are objectionable, a situation in which the producers of a commodity cannot get their goods to market except by selling them to the carrier is certainly anomalous, and the declaration of Congress that a remedy is needed does not seem unreasonable. In so far as the present statute applies to those who are now common carriers of oil in a physical sense the remedy provided of making them common carriers in a legal sense as well seems a proper one. But the statute includes also those who merely transport oil produced by their own wells, a proceeding which is hardly opposed to public policy.[14] Nor can it be argued that the prohibition of the entire business of transporting oil is a reasonable or necessary means of accomplishing the legislative purpose,[15] for there would probably be no difficulty in distinguishing

[11] Monongahela Navigation Co. *v.* United States, *supra*.

[12] The common law denounced contracts in restraint of trade and other practices tending to create monopoly rather than monopoly itself. See Standard Oil Co. *v.* United States, 221 U. S. 1, 55, 31 Sup. Ct. 502, 514. See FREUND, POLICE POWER, § 353.

[13] The legality of different sorts of monopolistic practices has always been subject to change in accord with altered economic conditions and ideas. See Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 481, 13 N. E. 419, 421; Nordenfelt *v.* Maxim Nordenfelt, etc. Co., [1894] A. C. 535, 553, 564. In recent years very stringent statutes directed against monopolizing have been held constitutional. United States *v.* Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25; Waters Pierce Oil Co. *v.* Texas, 212 U. S. 86, 29 Sup. Ct. 220.

[14] There may also be pipe-lines which, though they carry oil for others, do so by private contract and not as common carriers. Since no such lines were involved in the principal case, it is hardly necessary to discuss the constitutionality of the act with reference to them.

[15] It is true that a legislature may in many cases prohibit a business which may be conducted in an innocent and proper manner, if it reasonably believes such prohibition to be necessary to the suppression of some genuine evil. Booth *v.* Illinois, 184 U. S. 425, 22 Sup. Ct. 425; Purity Extract Co. *v.* Lynch, 226 U. S. 192. But the means used must be "reasonably necessary for the accomplishment of the legislative purpose

this class of oil-producers from pipe-line carriers in the exercise of a monopoly. Since the act cannot well be regarded as divisible, the inclusion of all pipe-line carriers would seem to render it unconstitutional.

RELATION OF PRICE *v.* NEAL TO THE DOCTRINE OF PURCHASER FOR VALUE WITHOUT NOTICE. — The rule of *Price* v. *Neal* which denies the right of a drawee of a bill of exchange or a check to recover money paid under a mistake as to the genuineness of the drawer's signature is firmly established,[1] but text writers have disputed its soundness,[2] or acquiesced only on the ground of policy.[3] It is now generally agreed that the holder of the instrument does not warrant its genuineness by surrendering it for payment even though he signs the instrument in acknowledgment thereof.[4] The present criticism of the rule is ultimately based upon the notion that the buying of the instrument and the payment by the drawee are distinct transactions which should be viewed separately.[5] Thus it is urged that the competing equities are not in the same *res*, the holder's equity being in the purchase price paid for the instrument, while the drawee's equity is in the sum paid to the holder.[6] It may be conceded that as a matter of mercantile technique there are two different transactions. But as a matter of substance they constitute a single purchase. The holder buys the instrument itself only for reasons of commercial convenience. The real thing bargained for is payment by the drawee. If instead of an order for money, he had bought an order for a conveyance of Blackacre, the substance of the transaction would be obvious.[7] The

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and not unduly oppressive upon individuals." See Lawton *v.* Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 501. See also C., B. & Q. Ry. Co. *v.* Drainage Commissioners, 200 U. S. 561, 593, 26 Sup. Ct. 341, 350. It is doubtful, however, whether any of the petitioners in the present suit can raise this objection, since all of them, save perhaps the Uncle Sam Oil Co., were found to be extensive purchasers of crude oil.

[1] For a collection of the authorities see the article by Professor Ames in 4 HARV. L. REV. 297, and the recent text on QUASI CONTRACTS by Woodward, §§ 80–92.

[2] See MORSE, BANKS AND BANKING, § 464; 2 DANIEL, NEGOTIABLE INSTRUMENTS, 5 ed., § 1361; KEENER, QUASI CONTRACTS, 154–158, n.

[3] See WOODWARD, QUASI CONTRACTS, § 87.

[4] See 17 HARV. L. REV. 580; 56 AM. L. REG. (N. S.) 122. But see 2 DANIEL, NEGOTIABLE INSTRUMENTS, 5 ed., § 1361; 58 CENT. L. J. 69.

Similarly, a bank receiving payment of a draft with a forged bill of lading attached does not warrant the genuineness of the bill of lading. Leather *v.* Simpson, L. R. 11 Eq. 398; Goetz *v.* Bank of Kansas City, 119 U. S. 551, 7 Sup. Ct. 318. See WILLISTON, SALES, § 435. These cases are also important because they demonstrate that the rule of Price *v.* Neal is not based upon the drawee's knowledge of the drawer's signature.

[5] See KEENER, QUASI CONTRACTS, 156; WOODWARD, QUASI CONTRACTS, §§ 84, 134.

[6] See WIGMORE, SUMMARY OF QUASI CONTRACTS, 25 AM. L. REV. 695, 706, n.; WOODWARD, QUASI CONTRACTS, § 84.

[7] *Cf.* People *v.* Swift, 96 Cal. 165; State *v.* Wells, Fargo & Co., 15 Cal. 336. See 4 HARV. L. REV. 310, n.

A bill of exchange or a check even though genuine is only an order. It does not give the holder a right against the drawee. Hopkinson *v.* Forster, L. R. 19 Eq. 74; Schroeder *v.* Central Bank of London, 34 L. T. R. 735; Bank of the Republic *v.* Millard, 10 Wall. (U. S.) 152. *Contra*, Munn *v.* Burch, 25 Ill. 35.